

# **A CITIZEN'S GUIDE TO LITIGATION**

Prepared by the  
**EVERGLADES LAW CENTER, INC.**  
Defending Florida's Ecosystems and Communities

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# A CITIZEN'S GUIDE TO LITIGATION

## INTRODUCTION

This pamphlet is a very generalized guide for litigation (lawsuits) and advocacy in cases that have the potential to proceed to litigation. It is meant for citizens who are attempting to enforce environmental or land use laws in defense of their communities or the natural resources upon which they rely. We have tried to be comprehensive but not exhaustive or overly detailed.

Do not rely on this document as legal advice. It does not tell you everything you need to know about the process and substance of lawsuits, standing to sue (legal right to sue based on being impacted by the decision at issue), the attorney-client privilege, discovery, and the myriad of details that are involved in litigation. The legal details on these issues are complex and change from state to state and from time to time, as environmental and land use laws are constantly being amended. It is meant to be a quick general guide that can significantly increase efficiency and effectiveness as you exercise your first amendment and legal rights to affect public policy and individual development decisions. The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Therefore, before you make your decision, ask the lawyer to send you free written information about their qualifications and experience.

The writers' experiences come from their years of experience with Florida law, in administrative, as well as state and federal courts. For your particular project or case in your particular state, the rules may be different and you must consult an attorney.

## GETTING INTO LITIGATION

Litigation is serious business. You must have a good faith basis for each allegation in the petition or complaint. In some cases, you must have expert witnesses. In some cases, you may need to give a deposition. The process differs greatly from state to state and between state and federal court. Certain local and

state administrative processes which resolve environmental or land use disputes do not involve evidentiary trials and depositions and such, but many do. Even for the former, there is typically a public comment process where all documents or evidence needed to bring a legal challenge must be entered into the record.

Whatever the process, litigation is hard work, requires constant attention, almost always includes tight timeframes, deadlines and surprises. Successful public interest litigants do not just hire a lawyer and then sit back and let them handle it. It has to be a work priority for the client. The client must be a full partner in prosecuting the case and it must be a time and attention priority if the case is going to be successful. If the client has been sloppy or brought a case that lacks legal or factual merit, the client could be found liable for attorney's fees and costs. Never bring a case if you do not have the time and interest to devote your full and complete attention to it.

### **IMPORTANT REALITIES & PRACTICAL CONSIDERATIONS FOR LITIGATION**

- \* Verify the facts, the facts as you believe them and the facts you can prove can be very different things. You cannot win lawsuits based on the facts as you believe them in your heart, no matter how right you are. You must critically analyze your case or project in terms of the facts you are likely able to prove given existing documentation and the ability to put witnesses on the stand.
- \* Think strategically about the real world situation, the political body or judge you will be facing, and think of how your objectives can be met through a combined strategy of political alliances, media contacts, creative solutions, or other tactics. The law and lawsuits almost always bend to practical, real world considerations, particularly at the stage where the judge or agency determines what "remedy" to require after finding a legal violation. Yes, clear violations of law are often allowed to stand if it is determined that full compliance would be impractical or inequitable.
- \* Anticipate several steps ahead and consider what the logical reactions of the opponent will be to your actions. Take specific actions only after you

have anticipated the chain of events leading to the likely end result, and have determined that the likely end result is beneficial.

- \* Know your “end game” – the ultimate outcome that you are trying to achieve, and have an overall game plan, of which your legal case is one component.
- \* Understand the needs and interests of all the parties/players – which interests do they have in common and which are not. When making decisions about what is an acceptable result, know that the opponents cannot accept a complete loss any more than you can.
- \* Recognize where major points of law are clear and well settled, and where they are not. Do not assume that your way of reading a law, rule or ordinance is the only way to read it, unless your lawyer tells you it really is. In most cases, the government’s interpretation is given deference if there is more than one reasonable interpretation.

The bottom line is that public interest legal advocates win when they convince the decision-maker that they should win and their opponent should not. Facts and legal arguments simply make up the various components of the overall story being told.

### CONSULT A LAWYER VERY EARLY IN THE PROCESS, EVEN IF JUST BRIEFLY

Because of the considerations discussed in this pamphlet and because the rules differ so much between cases and locations, we strongly recommend the following:

- Come up with the money to pay a lawyer for as many hours of their time, as early as possible, as you can afford (typically, it takes many months for a development project to work its way through the approval process).
- Have all teammates/neighbors/potential clients each commit enough money to pay for at least one hour of a lawyer’s time.
- Consult with the attorney and ask for advice about the legal criteria that

will determine the decision, procedures involved, and your rights under the law, and any other advice necessary to effectively advocate.

- Do not hide adverse facts from the attorney; it is important for counsel to know up front what he faces and be prepared to answer it.
- Remember that once you seek legal advice from a lawyer, all communications with the lawyer are confidential.

### **MUST AN ORGANIZATION BECOME A PARTY TO A LAWSUIT TO PLAY A MAJOR ROLE?**

Often groups or individuals want to support litigation but cannot become a party themselves, for a variety of valid reasons. More clients are not always better in litigation, as the more clients, the greater time expenditure and cost involved. There must always be at least one party who clearly has “standing to sue,” which means roughly that the individual (or, if an organization, a substantial number of its members) would be affected by the challenged decision in a real, tangible way. Typically that means either the individuals live close to the project or regularly uses an area – for example by fishing a river – that will be degraded by the authorized activities.

Standing to sue is a critical issue – without it, one cannot bring the suit – so this is one of the primary issues requiring consultation with an attorney. As the legal requirements differ between courts and types of cases, this pamphlet is not to be taken as legal advice on the legal or factual issues related to “standing.”

Once standing to sue is sufficiently addressed, there is not necessarily any additional benefit to including more parties in the litigation. Additional parties take up time: they may have to give depositions, answer interrogatories (formal written questions from an opposing party), coordinate approval of actions, and other things. If a potential party does not provide standing to sue, factual knowledge or expertise that existing parties do not otherwise have, they should probably not be included in the litigation.

However, there is much that an individual or organization can do to support litigation without becoming a party:

- They can provide funding. (Even a few hundred dollars can be the difference between being able to take a key deposition and not being able to do so.)
- They can help with the leg-work involved in litigation, as described in this pamphlet.
- They can help with the political/media/public strategy that is always necessary to complement litigation.

Often, a desire to come into a case as a named party is driven by the desire to get credit. That's the wrong reason.

As a wise person once said (we forget who it was exactly) ... "it's amazing what you can accomplish if you don't care who gets the credit."

### WORKING WITH THE LAWYER: DOING THE "LEG-WORK"

Public interest advocates cannot win by hiring a lawyer and expecting the lawyer to do everything for them. A major characteristic of "public interest" or "third party" advocacy and litigation is that the client typically does not have a financial interest at stake to justify the expenditure of significant funds to hire lawyers. While most people agree that protecting one's neighborhood, community, or the natural areas that enhance the quality of life is worth spending money to defend, there are financial realities and limits that environmental clients often face.

Public interest advocates typically must rely on pro bono (free) or "low bono" (very reduced rate) lawyers for representation. There are ways to make it easier and more attractive for these lawyers to take your case and handle it efficiently (less cost) and effectively. A key to winning in low budget litigation is for the law firm to have to do as little leg-work as possible by having the client or friends of the client "staff" the attorneys.

This means that the client can perform the following tasks:

- Secure copies of documents and reviews files;
- Obtain the necessary copies of documents;
- Set up and organize meetings, conference calls, etc.;
- Monitor meetings, agendas, and other information to stay on top of the status of a project;
- Locate and obtain expert witnesses to testify on their behalf;
- Prepare first drafts, with guidance by the lawyer, of hearing outlines, witness testimony, summaries of technical documents which identify for the lawyer the bottom line and main points;
- Prepare first drafts of press releases and the like; and
- Basically, do everything that does not require a member of the bar to do or otherwise require the analytical or other skills of an attorney.

\*\*Before doing any of these tasks, be sure to first confer with the lawyer and agree on how best to work together and avoid actions and efforts that might be the wrong tactic in your particular case.

### THINGS TO DO IN ANTICIPATION OF & DURING LITIGATION

Winning Cases Requires Efficient Information Processing. Once litigation has commenced the attorneys are under strict statutory deadlines for discovery and pre-trial stipulations; timeliness is critical to success. Turning over to your lawyer huge stacks of documents and several legal pads of handwritten random notes is not an efficient way to help your lawyer win the case. Therefore, while following an issue or project, take notes and keep documents in an organized fashion. Keep notes on a computer file. Remember that what is written down is, ultimately, going to form the basis for some finished product – a public comment, a legal pleading, a witness examination, etc. – so save it as such. Make sure that

computer files are named and organized logically. Use directories and subdirectories when appropriate. Be clear, organized, and efficient.

The guiding factor in case preparation is that the intended, ultimate result is a political or legal decision in your favor. It is crucial to begin thinking from the beginning what that decision needs to be. Identify and set forth, from the outset, the ultimate decision/result being sought, the relevant facts that support that decision (with notations that identify the specific evidence that will support specific factual findings), and the best legal and policy arguments in support of that decision.

For any project that might evolve into litigation, you should prepare and maintain a master outline of the issues and facts to facilitate an understanding of the big picture and the details. Development of this outline is important because it assists in viewing and understanding the project/case as a whole. Also, it can be an important tool in preparing for hearings or trial to identify both the differences and similarities in the versions of the facts and opinions presented by the different parties' witnesses and exhibits. Having a comprehensive outline assists in identifying crucial witnesses, documents, and the facts upon which the case will turn. It helps maintain organization and puts you in a better position to understand the facts, issues, and opinions and to recognize the strengths and weaknesses in your case. We strongly recommend that this outline be prepared and maintained at the direction of an attorney.

The case, project, or trial outline should answer the following questions:

1. What are the facts or circumstances that impact the decision? (i.e. quality and importance of the impacted ecosystem; likely impacts of the decision, etc):
  - a. What can be proved currently?
  - b. What additional people or evidence is needed?
  - c. What are the opponents expected to prove and how?
  - d. What do you not know yet?
2. What person or exhibit proves each factual or policy point?
3. What law governs your case or issue?
4. Why/how does your side win, based on the law and the facts?

5. What theme or story do you have to tell that will win the votes, or convince the judge or jury that you should win?

Such an outline can be turned over to your lawyer if/when the time comes and from which the lawyer can then do the following: Understand and analyze the case in general; determine what to ask for in requests for production (providing copies of documents to the opposing party); draft interrogatories; draft requests for admissions (a mechanism whereby facts can be admitted by all parties without the need to present evidence to prove them); determine witness and evidence needs; take depositions (questions of a potential witness under oath); draft direct examination of your witnesses; and draft cross examination of opposing witnesses.

### FACT & EXPERT WITNESSES

Depending on the type of case you get into, you may have a trial or evidentiary hearing at which witnesses will need to testify. In the process of following a project, reading reports, talking to people, etc, begin keeping a list of potential witnesses, both fact and expert. The list should include full name and contact information, including title, phone number, address, and room number. Your lawyer may need to find them later to subpoena them.

Qualitatively, think critically about how effective a potential witness may be, based on their qualifications, demeanor, articulateness, and other factors. Be able to recommend to your lawyer who would be an effective witness and who would not. Acquire resumes from potential expert witnesses.

Effective advocacy in political and legal forums requires multiple contacts with multiple people. Keep a computer and hard copy contact/reference list with all phone numbers, addresses, email addresses, of everyone with information or otherwise relevant to the matter.

## DOCUMENTS & EXHIBITS

Environmental and land use cases are typically very document heavy. Keeping track of documents is critical. Efficiently presenting a case requires being able to put your hands on documents/evidence quickly, and being able to get documents into the record. When collecting documents, know that they are only useful if your lawyer can get them into the record.

Therefore, when dealing with documents, remember the following:

- Get at least 2 copies of everything
- Make sure that the documents have some indicator of reliability and authenticity. (You cannot just hand a judge a document and say “take it from me...this is the official data from the State and it shows the locations of all radio-collared panthers over the past 10 years.”)
- To be useful in trials and hearings, documents must bear the name of the agency or company which produced them, or be accompanied by a memo or note from the person responsible for producing or maintaining them which explains what they are (certified copies or those bearing a stamp that they are true and correct copies of official records are best), and have a date (a court is not likely to accept data that may no longer be relevant).
- Do not write on the document. A document won't be accepted into a formal record if there is extraneous writing on it. If notes must be made on a document, get a second copy for that purpose.
- Organize documents by sub-issue, chronological order, person producing them, or any other way that makes sense given the particulars of the case. Put all potential exhibits in one place. It's best if they are each in a manila folder. Organizing documents as they are obtained is more efficient than having to go back later.
- Prepare a log of the documents you have, identifying them by title, date, etc. Later, when your lawyer needs to submit a document/exhibit list, this will save lots of time. Prepare it on a computer file that can save retyping.
- Accompanying memos explaining what the documents show are

important because a court will likely only allow that sort of testimony from an expert in the relevant field. For documents/ exhibits that are not self-explanatory, it may still be necessary to have an expert witness to interpret them. For very critical documents, keep track of the person from whom they were obtained as you may need to subpoena that person for hearing to “prove up” the document. Documents of unknown origin or authorship are virtually useless in any formal setting.

- Keep a file on everything said, done and submitted by the applicant for the development you are opposing.
- Keep a similar file for all agencies; some of the agency’s initial statements can be used against them if the agency later backs off.
- Use the Florida Sunshine Laws and Freedom of Information Act to your advantage. You should request copies of documents from government entities early and often. After litigation has commenced, have your attorney file the request on your behalf.

### CORRESPONDENCE, DOCUMENTS, AND E-MAILS

E-mails are documents just like letters, reports, studies, etc. They are not phone conversations that fade away into the universe. They are not confidential (unless they qualify for the attorney-client, or other limited privilege). If a party or witness to a lawsuit wrote it or received it, and if it contains thoughts or information that could possibly lead to relevant evidence in the suit, your opposing party can require it to be produced including, in some instances, having you give up your computer to a court appointed computer expert to find e-mails you thought you had previously deleted. The important implications of this, for e-mails and all written correspondence, are the following:

1. Keep e-mails to straightforward, factual information, process issues and valid opinions that you are happy to express publicly. Do not discuss confidential strategy, tactics, personalities, rumors, your true feelings about your opponents, etc. in e-mails. Save that stuff for the phone. If you don’t want to explain your e-mail to a reporter or the judge, do not write it.

2. Enlist an attorney early in the process to establish an attorney-client relationship, even if you can't afford to pay them for anything other than an initial consultation and to give advice now and then via e-mail. Including them on an e-mail can make it confidential under the attorney-client privilege, but only if all of the recipients of the e-mail are also that lawyer's client for that matter. Once you include a non-client on an attorney-client communication, you have waived the attorney-client privilege.

3. Spend less time on e-mails in general. Other than for sharing documents and information efficiently, they are not nearly as effective as a brief phone call. With conference telephone functions, multiple people can be on the line at once. Often, long e-mail strings are less effective than brief conference calls for brainstorming issues and developing action plans.

4. To the extent that e-mail discussion cannot be avoided, keep the recipients to the bare minimum. Send them on a "need to know" basis only. In a typical e-mail string of 10 people, 3 are doing all the work and the other 7 are more likely to innocently forward the email to someone they should not, than to actually be a productive part of the discussion. The more recipients, the greater chance of it being forwarded to an inappropriate recipient.

5. Make sure to identify all correspondence to your lawyer as "CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION."

### **WHAT YOU SAY AND PUT IN WRITING MAY BE USED AGAINST YOU**

When in litigation, things said in public (there may be a transcript, video, audio tape, meeting minutes, or newspaper account) or put in writing can and will be used against you by an opposing lawyer. So be smart. Keep in mind the recommendations in this pamphlet. Don't make unsupportable statements. Don't threaten to tie developers up in court until their financing runs dry. Don't make conciliatory concessions of fact or position unless such statements are strategically designed to achieve a certain outcome.

Occasionally, individuals/groups are fortunate enough to have an expert, consultant or a knowledgeable person assist them in the review of a proposed policy decision or development project. In these situations, a sense of being on

the same team is typically created, which is a good thing. But it is important to remember that there is no privilege of confidentiality in those discussions – either written or oral. If you want to use someone as a fact or expert witness at a hearing later, a paper trail that shows them to be an interested party or advocate, as opposed to a neutral witness or expert giving their professional opinion, can undermine the weight their testimony will be given.

### **IF YOU MUST GIVE A DEPOSITION OR TESTIFY IN A HEARING OR TRIAL**

Some tips for giving depositions or trial testimony:

- Speak slowly and clearly.
- Tell the truth.
- Do not state things as fact unless you know it to be true.
- Do not volunteer facts not requested and do not answer a question unless you have heard it clearly and understand what is being asked.
- If necessary, ask for a question to be repeated and for a moment to think before answering.
- Do not speculate. Answer based on what you do or do not know.
- Do not bring your notes to the deposition or if at trial, to the stand; they can be fair game for opposing counsel to review and question you about.
- If your attorney begins to speak, stop speaking and allow him or her to make the objection or statement before continuing.
- Do not be intimidated, flustered, or angered by an opposing attorney.
- Do not joke during a deposition and after the deposition is over, never chat with the opponents or their attorneys.

### **AVOIDING SLAPP SUITS & ATTORNEYS FEES**

SLAPP suits are a variety of different lawsuits that developers have become fond of filing against individuals or groups who oppose their project either in public forums or in court; the latter is much more prevalent. The term was coined by a law professor to mean Strategic Lawsuit Against Public Participation (“SLAPP”), and is used to refer to claims such as libel, defamation, civil conspiracy, intentional interference with contract or advantageous business relationship,

trespass, and other such actions.

SLAPP suits are meant to intimidate and often do. But they are almost always completely unfounded and frivolous. The bringer of such a suit can be sued for misuse of process, bringing a frivolous action or other claim, but of course that takes time and money.

In addition to SLAPP suits, most land use and environmental laws also contain an “attorney’s fees” provision under which a party can be found liable to pay the opposing party’s legal fees if they are found to have violated the standard set forth in the law. Typically, liability for fees results if the court finds your lawsuit was frivolous or completely without any good faith legal or factual merit. A party would not typically be liable for attorney’s fees simply because he or she lost the case at the end of the day. Such fees are granted only rarely, because the vast majority of lawsuits brought by people trying to enforce environmental or land use laws do have at least arguable merit. Nevertheless, in an effort to intimidate challengers into dropping their suits, it has become fairly standard practice for some lawyers to regularly file a motion for attorney’s fees.

Do not be intimidated by the potential for SLAPP suits and attorney’s fees. Instead, from the beginning of your advocacy, be smart and put yourself in a position where it would be virtually impossible for an opposing lawyer to even bring such a suit against you, let alone win one.

The following suggestions may be useful as general guides, but these are the types of issues about which we strongly recommend you consult an attorney prior to getting deeply engaged:

- Avoid accusations. Raise legitimate questions and insist on answers.
- Libel and slander suits can only be based on factual misrepresentations. Typically, expressions of opinions are legally protected. Only make factual claims if you are sure of your facts or can document them. When you make factual claims based on a credible source of information, attribute the information to that source.
- You have a near absolute constitutional right to express opinions and raise

questions about public policy matters, which most development projects involve. Phrase your comments as opinions or questions if you do not have your facts in order yet. For example, ask whether the agencies have fully investigated the extent of wetlands on site, instead of making an unsubstantiated claim that it's all wetland.

- Do not engage in gratuitous character assassination of your opponents under any circumstances. One of the few ways you can lose your first amendment privilege is if the court finds that you were acting out of actual malice towards the applicant/ developer. An e-mail string extolling your hatred for all developers – this one in particular – is not helpful.
- Never say, write, or have as your objective that you are attempting to leverage the delay you are causing into concessions from the developer.
- Be very, very careful about working, or worse – conspiring – with an economic competitor of a permit applicant. One of the few situations in which permit or development challengers have been forced to pay the developer's attorneys' fees is when they were found by the court to be essentially carrying the water for the competing shopping mall owner who was paying for merit-less environmental litigation in an effort to keep out the competition.
- Don't trespass to take notes, photos or video. Get consent from the property owner. Fly over the site with a photographer or videographer. Most laws require the applicant to let the agency people on site once they apply for a permit. Ask to be let on-site yourself. Once you get into litigation you can ask for a court order to let you and your experts on site.

In addition to the above, before filing a lawsuit, make and document a reasonable inquiry to determine that you have a good faith basis to believe the allegations you are making are true. This should generally mean that you have received in writing the opinion of an expert in the relevant field that they have reviewed the specific agency action you are about to challenge and believe that it will have an impact that they believe, or you believe based on your review of the law, is contrary to the relevant legal criteria.

For example, in a comprehensive plan case, the expert should have reviewed the plan amendment adoption ordinance, the data and analysis, and all

relevant parts of the plan. In a permit challenge, the expert should have reviewed the intended permit, the application and the technical information submitted in support of the application, and the agency staff review of same. Never file a lawsuit if you haven't read the permit or development decision, including attached maps or drawings, that you are attacking, or if you haven't read the lawsuit. You are not expected to be an expert on these things, but you will be expected to have done what you reasonably can to determine that there truly is something wrong with the action you are challenging. Consulting with an attorney or scientific expert, or reviewing the written decision against the relevant rules to identify apparent flaws and non-compliance, are among the most important steps you can take to demonstrate your "due diligence."

### CONCLUSION

The thoughts and recommendations above are meant to improve your effectiveness as an advocate and litigant, not by any means to dissuade you from advocacy and litigation. It is unfortunate, but true that litigation will often be the only way to ensure that the right thing happens. It can be hard and stressful, but much less so if you plan ahead and do it right, with great teammates. "Done deals" can be undone with litigation and the process can result in lasting friendships and alliances among those "in the trenches." Strategic and well-executed litigation can prevent terrible decisions on the ground, set legal precedent, change the dynamics for future decisions, and earn you and your colleagues respect in the community, although the latter requires you to be respectful of your opponents as well.

We hope you find this pamphlet helpful as you work to protect your community and your world. Please don't hesitate to contact us if you would like more information about the Everglades Law Center, or if you have a legal matter that you would like to discuss.

## ABOUT THE EVERGLADES LAW CENTER, INC.

The Everglades Law Center, Inc. (ELC) is a not-for-profit law firm dedicated to defending the public interest in environmental and land use matters. From our offices in Ft. Lauderdale and northern Palm Beach County, we represent citizens and organizations defending their communities and important ecosystems under state and federal growth management and environmental laws, and regularly appear before city and county commissions, state, regional or federal agencies, and courts of law. For over a decade, under our previous name – the Environmental and Land Use Law Center, and, since April 2006 as the Everglades Law Center, our work as lawyers and advocates has focused on restoring the Everglades and the Keys and to helping special places like Martin County prevent growth from ruining what makes them special. The ELC manages a public interest legal clinic along with its partner, the Shepard Broad Law Center at Nova Southeastern University in Ft. Lauderdale.

The members of our Board of Directors and staff have many years of experience in public interest land use and environmental advocacy. The ELC and its staff have won several major awards and received much recognition state-wide and nationally for our work on the major environmental issues facing Florida, particularly South Florida.

For more information about the ELC, please visit our website at [www.evergladeslaw.org](http://www.evergladeslaw.org), or contact our staff at the office nearest you.

Richard Grosso, Executive Director/General Counsel  
Everglades Law Center  
Shepard Broad Law Center · Nova Southeastern University  
3305 College Avenue · Ft. Lauderdale, Florida 33314  
Phone (954) 262-6140 · Fax (954) 262-3992

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Lisa Interlandi, Northern Everglades Regional Counsel  
Robert Hartsell, Trial Counsel  
Everglades Law Center  
Northern Everglades Office  
330 U.S. Highway 1, Suite 3 – Lake Park, Florida 33403  
Phone: (561) 844-5222 – Fax: (561) 844-5004